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No. 07-775

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IN THE

Supreme Court of the United States

ALLSTATE INSURANCE COMPANY, *et al.*,
Petitioners,

v.

GREG ABBOTT, ATTORNEY GENERAL OF TEXAS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENTS AUTOMOTIVE SERVICE ASSOCIATION AND CONSUMER CHOICE IN AUTOBODY REPAIR IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a state law that regulates vertical integrations by insurance companies is subject to scrutiny under the dormant Commerce Clause given that the McCarran-Ferguson Act grants to the states primary authority to regulate the business of insurance.

2. Whether a state law that regulates vertical integrations should be subject to strict scrutiny under the dormant Commerce Clause when plaintiffs failed to prove discrimination against interstate commerce in purpose or effect.

RULE 14.1 STATEMENT AND CORPORATE DISCLOSURE STATEMENT

The caption of the case contains the names of all parties to the proceeding in the court whose judgment is sought to be reviewed.

The Automotive Service Association ("ASA") and Consumer Choice in Autobody Repair ("CCAR") are not-for-profit associations headquartered in Texas that intervened as defendants in this lawsuit to defend HB 1131. ASA and CCAR are respondents in this Court. ASA and CCAR have no parent corporations, and no publicly traded companies own 10% or more of their stock.

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CONSTITUTIONAL AND STATUTORY PROVISIONS

In addition to the constitutional and statutory provisions listed in the Petition, this case also raises an issue under Section 2(a) of the McCarran-Ferguson Act, which states: "The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." 15 U.S.C.

§ 1012(a). The full text of 15 U.S.C. § 1012 is set forth in the attached Appendix.

STATEMENT OF THE CASE

This is a case about the regulation of the business of insurance. This is not a case about "Anti-Wal-Mart Legislation." The State of Texas enacted HB 1131[1] based on a concern that vertical integration by insurance companies into the auto collision repair market would result in a conflict of interest and anticompetitive conduct that would harm consumers and competition as a whole.

Following trial (on what Petitioners admit is a well-developed record), the district court made numerous findings of fact that confirmed that the State's concerns were real. Allstate Insurance Company ("Allstate"), a seller of automobile liability insurance policies, was using its market position to influence consumers by giving preferential referrals to its wholly-owned subsidiary Sterling Collision Centers ("Sterling"), a seller of auto collision repair services, without regard to the quality of service Sterling provided to consumers. App. 49a, 52a-53a, 55a, 67a. The district court continued:

> Allstate placed its own financial interests in Sterling above those of its policyholders who often turned to Allstate for guidance and recommendations about where to take their vehicles for repair following an accident.

App. 52a. Allstate provided Sterling with confidential business information about Sterling's competitors

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[1] "HB 1131" is now codified as Tex. Occ. Code § 2307.001, *et seq.*, and is reproduced in full at App. 111a.

in an effort to help Sterling compete, unfairly. App. 50a-51a. Allstate was able to provide that preferential treatment to Sterling only because of Allstate's position of trust with its policyholders and its access to business information from Sterling's competitors (other repair shops) who were dependent upon Allstate to pay their bills. App. 36a-37a.

In an effort to save its anticompetitive business model of insurer-owned shops from regulation, Allstate seeks to undermine well established authority allowing state regulation of harmful vertical integrations, *see, e.g., Exxon v. Maryland*, 437 U.S. 117 (1978). Contrary to Petitioners' suggestions, there is no circuit split, much less a widening one, over how to apply the dormant Commerce Clause in cases such as this. Courts routinely uphold non-discriminatory state laws regulating or prohibiting vertical integrations that are potentially harmful to consumers or the markets. Moreover, courts recognize that an otherwise valid law does not become subject to heightened judicial scrutiny under the dormant Commerce Clause simply because it may impact some interstate entities. Despite Petitioners' suggestion, the Fifth Circuit did not create a "business form" exception to the dormant Commerce Clause. Instead, the Fifth Circuit applied settled precedent to conclude that HB 1131 is valid and does not discriminate against interstate commerce.

Even if there were a circuit split such as Petitioners allege, this case would not be a good one to resolve that split because this case involves state regulation of the business of insurance. Under the McCarran-Ferguson Act, Congress granted the states primary authority to regulate the business of insurance. 15 U.S.C. § 1012(a). Thus, this Court should

not even reach the dormant Commerce Clause issues Petitioners present.

FACTUAL BACKGROUND

1. The Texas Legislature adopted HB 1131 in the first legislative session following Allstate's acquisition of a few Sterling stores in Texas.[2] Legislators expressed concern that allowing insurance companies to own collision repair shops would create a conflict of interest, in which the insurer would place its own financial interests ahead of that of the consumer needing repairs covered by an insurance policy. App. 52a, 56a, 57a. Legislators were concerned that an insurer could use its market position in the insurance market unfairly to compete in the repair industry by steering consumers to their own repair shops and limiting the extent of repairs allowed to be made. App. 56a-57a. Prior to adopting HB 1131, the Legislature heard testimony regarding all of the following offensive practices by insurers in the collision repair market:

> Insurance companies "force repairers to use cheaper, inferior parts, place caps on the price that can be charged . . . or steer business away from specific shops."
>
> They gave low estimates of what it cost to make repairs, making it more difficult to

[2] Allstate claims that the proponents of HB 1131 waited 18 months after Allstate acquired Sterling to pursue legislation prohibiting insurer-owned shops. This claim overlooks that the Texas Legislature sits in regular session once every two years. *See* TEX. CONST. Art. III, §5(a). HB 1131 was initially proposed in the Texas House of Representatives in February 2003, near the beginning of the 78th legislative session. The Texas Legislature was not in session in 2002.

> obtain competitive bids from shops Allstate did not control.
>
> Insurers forced the repair of vehicles under circumstances in which qualified repair shops concluded that the vehicle was a "structural total."
>
> Allstate directed repair facilities to perform only partial repairs or to cut corners when they could get away with it.
>
> Sterling did not engage in significant advertising but, instead, relied upon Allstate for referrals. Sterling employees even admitted they relied upon Allstate agents to guide customers to Sterling locations.
>
> Allstate terminated repair facilities from their PRO program that were near Sterling shops to increase the business available to Sterling.

App. 58a. Allstate's own internal marketing surveys prepared before the acquisition of Sterling, which Allstate produced in discovery in this case but did not give to the Legislature, echoed similar concerns. App. 59a-60a.

HB 1131 received widespread support before the Legislature from local shops such as Herb's Paint & Body Shop (in the Dallas-Fort Worth metro area), and from interstate groups such as VT, Inc. and Automotive Investment Group ("AIG") (which operate collision repair shops in 11 different states). Respondent ASA, which is a national organization of collision repair shops that includes all kinds of shops from local shops to nationwide chains, supported HB 1131 before the Legislature, and intervened in this litigation to defend that law against challenge. The

primary opponents to HB 1131 were insurance companies and Sterling.

2. Petitioners attempt to characterize this as a case about protectionism against interstate entities by arguing that there are "relatively few (about 5)" interstate collision repair shops and that Sterling is "by far the most competitively significant" of those shops. *See* Pet. at 4-5. But, the district court found to the contrary as a matter of fact.

At the time the State enacted HB 1131, there were numerous interstate collision repair chains operating in Texas, including independently owned chains, chains tied to interstate dealerships, and one insurer-owned chain, Sterling. The district court found that "the market is currently composed of both interstate and intrastate firms," and cited examples of interstate competitors in the market. App. 85a-87a. The district court found: "Allstate reviewed and evaluated several interstate autobody repair consolidators, including ABRA, AutoNation, the Boyd Group, Caliber, CTA, True 2 Form, and M2" before it acquired Sterling. App. 44a. Petitioners never conducted any surveys of the Texas market or offered any evidence to rebut the showing that there were numerous interstate competitors in the market. The district court found that Petitioners presented no evidence—only mere speculation—that HB 1131 has a discriminatory effect on interstate commerce. App. 66a-67a, 85a.

Similarly, Petitioners failed to prove that Sterling was "the most competitively significant" of the interstate repair shops. Having failed to produce any evidence of the interstate chains in the market, Petitioners provided no evidence from which a comparative analysis could be prepared. Furthermore, as

the district court found, Sterling was performing poorly, with "hard evidence of quality problems" and lower customer satisfaction than at non-Sterling shops. App. 49a-50a.

3. HB 1131 does not prohibit the continued growth of the interstate collision repair market, as Petitioners claim. Instead, HB 1131 prohibits only one type of business, insurer-owned shops, regardless of whether those insurers are based outside or inside of Texas. App.81a-82a.

REASONS TO DENY THE WRIT

Petitioners seek to lower the hurdle required to obtain strict scrutiny of state laws under the dormant Commerce Clause to an all-time low. They argue that state laws targeting a particular "business form" should be subject to strict scrutiny under the dormant Commerce Clause. This Court should deny the Petition because the challenged law is one that relates to the "business of insurance" and, thus, is not subject to scrutiny under the dormant Commerce Clause. *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 428 (2003); *Dept. of Treasury v. Fabe*, 508 U.S. 491, 500 (1993); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429-30 (1946). Even if HB 1131 were subject to scrutiny under the dormant Commerce Clause, this Court has held that the dormant Commerce Clause does not protect a particular business form or structure of a market. *See CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 93-94 (1987); *Exxon v. Maryland*, 437 U.S. 117, 127 (1978). As *Exxon v. Maryland* shows, there is nothing wrong with a state statute prohibiting a type of vertical integration deemed harmful to consumers or competition. It is only when a state law has the purpose or effect of discriminating against interstate commerce that the

law becomes subject to heightened scrutiny. The Fifth Circuit applied this Court's precedent to conclude correctly that HB 1131 does not discriminate against interstate commerce on its face, in purpose, or in effect. Moreover, other courts are not confused about this Court's precedents. There is no need or reason to grant the Petition.

A. The McCarran-Ferguson Act Removes This Case from Scrutiny under the Dormant Commerce Clause.

The present case is an inappropriate case to review the dormant Commerce Clause issues raised in the Petition because Congress expressly removed state regulation of the "business of insurance" from scrutiny under the dormant Commerce Clause by adopting the McCarran-Ferguson Act. *See Garamendi*, 539 U.S. at 428; *Fabe*, 508 U.S. at 500; *Benjamin*, 328 U.S. at 429-30. This Court should not unnecessarily decide constitutional issues such as those presented in the Petition when the case may be resolved on other grounds. *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105 (1944).

The Fifth Circuit did not reach the McCarran-Ferguson Act issue because it affirmed the district court's holding that HB 1131 did not violate the dormant Commerce Clause. App. 24a. The district court ruled against the State and Intervenors' McCarran-Ferguson defense, App. 68a-75a, but for the reasons described below, that ruling is error. The McCarran-Ferguson Act issue remains in this case.

Section 2(a) of the McCarran-Ferguson Act provides: "The business of insurance . . . shall be subject to the laws of the several States which relate to the regulation or taxation of such business." 15 U.S.C.

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§ 1012(a). Section 1 of the Act expressly addresses the dormant Commerce Clause, stating ". . . silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of the [business of insurance] by the several States." 15 U.S.C. § 1011. The only question that remains is whether HB 1131 is a law "which relate[s] to the regulation" of the business of insurance.

This Court has said in a similar context that the statutory language "which relate to" found in Section 2(a) means "if it has a connection with or reference to" the subject, which here is regulation of the business of insurance. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47-48 (1987). This is a broad standard. HB 1131 meets that standard because it is part of the State's laws regulating the types of business that an insurance company may pursue. HB 1131 prohibits insurance companies licensed to sell automobile liability insurance in Texas from vertically integrating into the collision repair market.

The district court erred by misunderstanding Section 2(a). The district court's error arose from Congress' use of the phrase "business of insurance" in three separate places in Section 2 of the McCarran-Ferguson Act, each of which has a different scope. Section 2(a) of the Act (at issue in this case) is the broadest, granting the states the authority to adopt laws "which relate to" the business of insurance. Section 2(b) of the Act is the "reverse preemption" provision of the Act that provides that "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business or insurance . . .". 15 U.S.C. § 1012(b). Finally, Congress provided a limited exemption of the "business of in-

surance" from federal antitrust laws. 15 U.S.C. § 1012(b). Consistent with the principle that exemptions from antitrust laws should be interpreted narrowly, this final use of the "business of insurance" in Section 2 is the narrowest of the three. *See Fabe*, 508 U.S. at 504-05.

Rather than recognizing the expansive scope of Section 2(a) of the McCarran-Ferguson Act, the district court erroneously applied the narrow test for what constitutes the "business of insurance" under Section 2(b)'s antitrust exemption. App. 69a-75a. These Respondents respectfully submit that this Court should not reach the dormant Commerce Clause issue presented in the Petition without first addressing whether the McCarran-Ferguson Act applies. If it does, the Commerce Clause is no longer "dormant," and there is no constitutional issue to decide.

B. The Fifth Circuit Applied This Court's Settled Precedent to Determine that HB 1131 Does Not Discriminate Against Interstate Commerce.

Petitioners claim that the Fifth Circuit departed from this Court's prior decisions by "fail[ing] to examine the purpose or effect of the state legislation[.]" *See* Pet. at 18. Petitioners claim that in the Fifth Circuit, "facially neutral statutes are effectively immune from challenge" under the dormant Commerce Clause if the law is directed at a particular business form. *See id.* But, the Fifth Circuit's decision shows otherwise. The Fifth Circuit wrote:

> A statute violates the dormant Commerce Clause where it discriminates against interstate commerce either facially, by purpose, or by effect.

App. 14a. The Fifth Circuit then engaged in a detailed analysis to apply that standard. App. 15a-22a. The court concluded that the purpose of HB 1131 was to regulate all insurers licensed to sell automobile liability insurance in Texas, regardless whether they were based inside or outside Texas. The purpose of HB 1131 was not to target interstate commerce. Thus, the court concluded that HB 1131 was not discriminatory towards interstate commerce. Similarly, the Fifth Circuit analyzed whether HB 1131 had a discriminatory effect against interstate commerce; the court concluded that it did not.

1. The Fifth Circuit Analyzed Whether HB 1131 Had a Discriminatory Purpose Using the Correct Legal Standard, and Concluded It Did Not.

The Fifth Circuit did not create a *per se* rule that all laws regulating a "business form" are immune from regulation. Instead, the Fifth Circuit conducted a fact-specific analysis employing the correct legal standard. Petitioners argue that the Fifth Circuit should have considered all circumstances to determine whether HB 1131 had a discriminatory purpose. Pet. at 24-26. Yet, that is precisely what both the district court and Fifth Circuit did, using the factors identified in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-68 (1977) as a guide. The Fifth Circuit looked at "(1) whether a clear pattern of discrimination emerges from the effect of the state action; (2) the historical background of the decision, which may take into account any history of discrimination by the decisionmaking body, (3) the specific sequence of events leading up to the challenged decision, including departures from normal procedures; and

(4) the legislative or administrative history of the state action, including contemporary statements by decisionmakers." App. 15a.

After considering all of those factors, the Fifth Circuit agreed with the district court's findings of fact that HB 1131 did not have a discriminatory purpose. App. 15a-19a. Petitioners attack the Fifth Circuit's and the district court's analysis on two levels, arguing that a few statements by individual legislators and the circumstances surrounding the adoption of HB 1131 show a protectionist intent. Petitioners' arguments are contrary to the facts found in this case and settled law.

First, Petitioners did not establish that this is a "mixed motive" case with protectionism being one of those motives, based upon isolated statements of individual legislators (which are taken out of context). It is well-settled that the comments of individual legislators are not controlling on the intent of the legislature as a whole. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 n.15 & 463 n.7 (1981). This Court should decline Petitioners' invitation to depart from this settled principle.

Second, Petitioners' claim that HB 1131 was drafted at the request of a local body shop owner ignores the full context under which HB 1131 was adopted. HB 1131 treats all insurance companies licensed in Texas alike regardless whether they are intrastate or interstate entities. As discussed above, HB 1131 was supported by all types of collision repair chains, including interstate ones. HB 1131's supporters included national chains, interstate automobile dealership groups, and nationwide organizations such as Respondent ASA. Thus, Petitioners' discriminatory

purpose arguments are contrary to the "totality of the circumstances" approach Petitioners advocate.

Petitioners have not shown any "confusion" by the Fifth Circuit or any other court that warrants this Court's intervention to elaborate further upon the standards to consider when determining whether a statute has a discriminatory purpose.

2. This Court Never Adopted the Discriminatory Effects Analysis that Petitioners Claim the Fifth Circuit Should Apply.

Through its "discriminatory effects" argument, Petitioners seek to impose a new, lower standard of how to determine when a state law should be subjected to a strict scrutiny review under the dormant Commerce Clause that would greatly impair the ability of state legislatures to act to prevent harm to consumers and businesses. Petitioners criticize the Fifth Circuit for not accepting their unprecedented "business shifting" test to determine whether a statute has a discriminatory purpose. The test proposes to find that a state law has a discriminatory effect any time the law causes some business to shift from interstate firms to intrastate firms. Petitioners' test, however, is not the law; it is based on misreading a footnote in *Exxon v. Maryland*, 437 U.S. at 126 n.16. *See* Pet. 18a. In *Exxon*, this Court wrote:

> If the effect of a state regulation is to cause local goods to constitute a larger share, and goods with an out-of-state source to constitute a smaller share, of the total sales in the market, the regulation ***may*** have a discriminatory effect on interstate commerce.

Id. (emphasis added). Petitioners ignore the fact that this Court used the word "may" when describing what might demonstrate a discriminatory effect.

Petitioners' proposed standard would lower the hurdle for strict scrutiny so low that almost any statute, no matter how benign the intent, would be subjected to an almost-always fatal dormant Commerce Clause challenge. The Fifth Circuit, in contrast, reviewed all of the evidence to determine whether HB 1131 has a discriminatory effect. The Fifth Circuit did not limit itself to a mathematical analysis such as Petitioners request of whether any sales (no matter how few) might shift from interstate entities to intrastate entities due to HB 1131. If the totality of the circumstances had shown a discriminatory effect on interstate commerce, the law would have been subjected to strict scrutiny review. But, because the circumstances did not show a discriminatory effect here, the Fifth Circuit properly proceeded to a *Pike* balancing analysis. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

Petitioners' proposed standard also impermissibly restricts the power of state legislatures to act to prevent new, growing harms when the entities first engaging in harmful activities are incorporated outside of the state. Here, Petitioners' argument challenging HB 1131 is based on the facts that Allstate's home office is in Illinois and it operates in multiple states. But what would happen if a local, Texas based insurer first implemented the idea of insurer-owned shops? Under such a circumstance, the legislature could act to stop the practice without implicating the dormant Commerce Clause. The result should be no different just because it was an out-of-state entity that first implemented the idea of

insurer-owned shops. The State was not required to wait for the problem of insurer-owned shops to grow to a crisis level, before taking action. *See Turner Broadcasting Systems, Inc. v. F.C.C.*, 520 U.S. 180, 212 (1997); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 264 (2002).

Even if this Court were inclined to consider Petitioners' request to adopt a formalistic "business shifting" test, the present case is a poor candidate to consider that request. As the district court found, Petitioners offered no evidence (just speculation) that HB 1131 would cause a shift in business from interstate chains to local competitors. App. 85a. Petitioners produced no market studies or other competent evidence to show the impact or potential impact of HB 1131 on the market. Petitioners did not offer evidence to dispute the fact that there are numerous interstate competitors in the Texas collision repair market.

C. There Are No Circuit Splits Implicated By this Case That Warrant Review.

Petitioners claim that the Fifth Circuit's decision creates circuit splits on three issues: (1) how to determine legislative intent under the dormant Commerce Clause; (2) how to apply *Exxon v. Maryland*, and (3) what are similarly situated entities for dormant Commerce Clause analyses. There are no circuit splits on these issues.

1. There is no circuit split on how to review legislative intent to determine whether a statute is discriminatory under the dormant Commerce Clause. The Fifth Circuit employs a fact-specific analysis (described above) that is similar to the analysis used

in the Sixth and Eighth Circuit decisions Petitioners cite.

In *McNeilus Truck & Mfg., Inc. v. Ohio*, 226 F.3d 429 (6th Cir. 2000), the Sixth Circuit conducted a fact-specific analysis before holding the Ohio statute in question discriminatory. *McNeilus* involved an Ohio law that is not evenly remotely analogous to HB 1131. The challenged law required all truck re-manufacturers to obtain service agreements for their customers from Ohio dealers. *Id.* 442. Ohio dealers were not willing to enter into service agreements with out-of-state re-manufacturers because out-of-state re-manufacturers were less likely to buy truck chassis from the Ohio dealers. *Id.* Accordingly, the law discriminated against out-of-state competitors by imposing a facially neutral requirement that could not be met by out-of-state competitors. HB 1131 does not create any barriers to entry into the Texas collision repair market that are different for in-state or out-of-state competitors. HB 1131 applies equally to all.

The Eighth Circuit also used a fact-specific analysis to determine that two South Dakota laws aimed at limiting those who could own and operate farms or ranches in South Dakota were unconstitutional in *Jones v. Gale*, 470 F.2d 1261, 1267-70 (8th Cir. 2006), and *South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 593-96 (8th Cir. 2006). In *Jones*, the Eighth Circuit held a statute discriminatory on its face and in its purpose because it drew an express distinction between "Nebraska family farm corporations" and all other corporations. 470 F.2d at 1267-70. The law gave preferential treatment only to the "Nebraska family farm corporations" and individual farmers living in Nebraska. *Id.* Similarly, in

Hazeltine, the court held a law prohibiting corporations from owning South Dakota farm land unconstitutional based upon an extensive record of a protectionist intent coupled with a complete absence of evidence to show a legitimate governmental purpose furthered by the law. 340 F.3d at 593-96. In the present case, HB 1131 does not draw express distinctions between Texas entities and out-of-state entities. It was adopted at a time when there were already numerous interstate competitors in the Texas market that are not affected by HB 1131; and it was adopted to serve legitimate governmental purposes as reflected in the record of abuses by insurance companies in the collision repair market.

2. There is also no circuit split about how to apply *Exxon v. Maryland*. The Fifth Circuit's decision in this case and the Sixth Circuit's decision in *LensCrafters v. Robinson*, 403 F.3d 798, 802-07 (6th Cir. 2005), are straightforward applications of *Exxon* to vertical integration legislation. Petitioners are wrong when they claim that these decisions created a circuit split with the First and Seventh Circuits. The First and Seventh Circuit cases Petitioners cite are not even vertical integration cases.

The First Circuit's decision in *Walgreen Co. v. Rullen*, 405 F.3d 50 (1st Cir. 2005) involved access to the pharmacy market in Puerto Rico. The law in question required new entrants into the market to obtain a "certificate of need" before opening a pharmacy in Puerto Rico. *Id.* at 52-60. The court found the challenged law discriminatory in violation of the dormant Commerce Clause based upon detailed evidence that (1) local pharmacies constituted 92% of the market, (2) the existing pharmacies were exempted from the statute's requirements,

and (3) they were given the right to object to new entrants. *Id.* at 55-56. The record further showed that out-of-state pharmacies were more-likely to be subjected to an extensive administrative review process to obtain the needed "certificate" than were their in-state counterparts, and were more likely to have their applications denied. *Id.* at 56. The First Circuit's finding of discrimination was based upon a 22 year statistical study showing discrimination. In contrast, HB 1131 does not establish local controls over access to the Texas collision repair market. Moreover, Petitioners offered no evidence of the impact of HB 1131 on the market.

The Seventh Circuit's decision in *Government Suppliers Consolidating Services, Inc. v. Bayh*, 975 F.2d 1267, 1279 (7th Cir. 1992) is even less relevant to the present case. The Seventh Circuit decision addressed an attempt by Indiana to raise the costs associated with transporting hazardous wastes in an effort to divert out-of-state wastes from Indiana. *Id.* HB 1131 does not prohibit the transportation of out-of-state goods into the Texas market.

3. There is also no circuit split on how to determine what constitutes a "similarly situated" entity for purposes of dormant Commerce Clause analysis. Petitioners' allegations of a circuit split once again confuses the distinction between legislation targeting a vertical integration (*e.g.* the *Exxon / Ford*[3] / *Lens-Crafters* situation) verses those that do not (*e.g. Bacchus / Tracy / United Haulers*). In a vertical integration case, the concern is about an entity using its market power in one market to move into a separate

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[3] *Ford Motor Co. v. Texas Dept. of Transportation*, 264 F.3d 493 (5th Cir. 2001).

market. Accordingly, there are two markets to analyze: the upstream market (here insurance) and the downstream market (here collision repairs). In contrast, in a classic case of discrimination against interstate commerce, there is only one market to consider, a horizontal market.

In a vertical integration case, the proper analysis requires a court to analyze the impact of the law on each of the two markets. If the challenged law does not cause a discriminatory impact on either the upstream or downstream markets (as is the case with HB 1131), the law is not discriminatory for purposes of the dormant Commerce Clause. A vertical integration restriction is not discriminatory in violation of the dormant Commerce Clause merely because it prohibits the merging of the two vertical markets.

Petitioners mistakenly rely on *National Revenue Corp. v. Violet*, 807 F.2d 285, 288-90 (1st Cir. 1986), to argue there is a circuit split. *National Revenue Corp.* is not a vertical integration case. Instead, it is the reverse of the present situation. Rhode Island attempted to corner the debt collection market so that only attorneys licensed in Rhode Island could pursue business in that market. *Id.* Rhode Island wanted to prevent outside competition from entering the market. *Id.* Thus, *National Revenue Corp.* involved a horizontal market restriction of the debt collection market in which attorneys were already present. That case has no bearing on the question presented here on how to analyze whether entities are similarly situated for purposes of analyzing a vertical integration restriction.

Petitioners argue that there is a conflict of authorities based upon a district court opinion in *Nat'l Ass'n of Optometrists & Opticians v. Lockyer*,

463 F. Supp.2d 1116 (E.D. Cal. 2006). That case is currently on appeal to the Ninth Circuit (docketed as Case No. 07-15050). Given the clear authority described above that addresses how to analyze a vertical integration restriction under the dormant Commerce Clause, it is likely that the Ninth Circuit will follow settled law and avoid creating a circuit split on this issue. It would be premature to take the issue now in this case.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition.

Respectfully submitted,

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